

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in December 2013**

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to [wvgb@wv.gov](mailto:wvgb@wv.gov).

**NOTICE:** These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

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**HIGHER EDUCATION EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Tenure Fast Track; Waiver of Policy; Prior Experience Credit; Terminal Contract; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Scarpaci v. West Liberty University</u>  DOCKET NO. 2013-2229-CONS (12/23/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent acted in an arbitrary and capricious manner when Grievant was not awarded tenure.
<b><u>SUMMARY:</u></b>	<p>Grievant applied for tenure after being employed at West Liberty University for one year. When Grievant was hired, he accepted the position with the understanding that he would be allowed to apply for tenure after one year, and that three to four years of his prior experience would be considered when he applied. This offer was approved by the President of West Liberty University, in writing. West Liberty's Policy 216 states that a professor must be employed at West Liberty University for five years before he can apply for tenure. The Tenure Review Committee determined that it had no authority to review the application for tenure because of the Policy 216 requirement. The Dean of the College of Business recommended Grievant for tenure. The new Provost acknowledged that Grievant had been told he could apply for tenure early, but refused to look at Grievant's record prior to his time at West Liberty, and recommended that tenure be denied. The President questioned whether Grievant could apply for tenure, and then denied tenure based on the Provost's written denial, and issued Grievant a terminal contract. A terminal contract is provided for in Policy 216 for the employee's seventh year after tenure is denied, and as Grievant had not been an employee for six years, this provision was not applicable. Respondent's actions were arbitrary and capricious. WLU entered into an agreement with Grievant to waive the provision of Policy 216 which required that he be employed at WLU for five years before he could apply for tenure. That agreement included that Grievant's last three to four years of work, prior to his employment at WLU would be considered in the tenure review.</p>

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**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

<b><u>KEYWORDS:</u></b>	Discussing Sexual Preferences; Soliciting Sexually Explicit Photos; Immorality; Insubordination; Misconduct; Employee Code of Conduct; Hearsay; Rational Nexus; Exclusionary Rule; Arbitrarily and Capriciously
<b><u>CASE STYLE:</u></b>	<u>Adkins v. Cabell County Board of Education</u> DOCKET NO. 2013-1028-CabED (12/20/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent established a rational nexus between Grievant's misconduct and his duties as a teacher.
<b><u>SUMMARY:</u></b>	<p>Grievant's employment was terminated for insubordination and immorality. The evidence established that Grievant engaged in instant messaging conversations outside normal school hours with three male high school students in which he asked the students if they were gay and what porn they liked to watch, and referred them to a gay porn web site. In addition, during the 2008-2009 school year, he sent sexually oriented text messages to one of his male students, who was 17 years old at the time, soliciting and receiving via the Internet explicit photos of the student exposing his erect genitals. Grievant likewise exchanged electronic messages with a second high school student sometime around the same time frame, obtaining similar photographs of that 16 year old male exposing his erect genitals. These photographs were located on Grievant's electronic communication devices which were forensically examined by a State Police expert after they were seized from his residence pursuant to a search warrant issued by the Circuit Court of Cabell County. This warrant was subsequently quashed by the Circuit Court and the criminal charges against Grievant dismissed. Nonetheless, this evidence was found to be admissible in an administrative grievance proceeding based upon a determination that the exclusionary rule derived from the Fourth Amendment is not applicable to such proceedings. Based upon the established facts, Grievant's conduct constituted immorality prohibited by W. Va. Code § 18A-2-8(a), as well as insubordination for disregarding the behavior standards in the State Board of Education's Employee Code of Conduct. Therefore, this grievance must be denied.</p>

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**COUNTY BOARDS OF EDUCATION**  
**SERVICE PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Judgment by Default; Time Lines; Failing to Schedule Level One Conference; Justified Delay
<b><u>CASE STYLE:</u></b>	<u>Smith v. Wood County Board of Education</u> DOCKET NO. 2013-2255-CONSDEF (12/17/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved that the default was a result of a "justified delay not caused by neglect or intent to delay the grievance process."
<b><u>SUMMARY:</u></b>	The default provisions of W. VA. CODE § 6C-2-4(a)(2) require that written notice of a level one conference be given, and that the conference must be held within ten days of receipt of a grievance by Respondent. Respondent defaulted by failing to schedule and provide notice of a level one conference within ten days of receipt of the grievance. Moreover, Respondent failed to meet its burden of proving justified delay or excuse.

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<b><u>KEYWORDS:</u></b>	Vacancy; Posting; Leave of Absence; Retirement; Withdrawn Posting; Modification Of Assignment
<b><u>CASE STYLE:</u></b>	<u>Little v. Monongalia County Board of Education</u>  DOCKET NO. 2013-1425-MonED (12/17/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had to post a position when an employee took two leaves of absence, both less than 30 days. Whether Respondent had to fill the vacancy within 20 days of an employee's retirement, or could the posting be withdrawn to allow time to assess ways to change the assignment to reduce its length.
<b><u>SUMMARY:</u></b>	Grievant argued that a bus route should have been posted when an employee took a leave of absence. The first leave of absence did not extend beyond 30 working days, and as such, there was no requirement that it be posted. The second leave of absence also did not extend beyond 30 working days, and a few days into the absence, the employee retired, thereby negating the leave of absence, so that no posting was required. Grievant then argued that Respondent had to fill the vacancy within 20 working days of the date of the retirement. Respondent posted the vacancy and then withdrew the posting in order to reassess the lengthy bus route to try to reduce the amount of time students spent on the bus, and the amount of overtime required. Respondent eventually was able to reduce the length of the route immediately prior to the time Grievant was awarded the route. It was not the same route that the employee who retired had been assigned, and was not a vacant position which had to be posted within 20 working days of the retirement while Respondent was trying to reconfigure the route.

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**KEYWORDS:** Probationary Contract; Nonrenewal; Service Personnel Evaluation; Attendance; Arbitrary and Capricious

**CASE STYLE:** Lucas v. Monroe County Board of Education  
DOCKET NO. 2013-1982-MnrED (12/24/2013)

**PRIMARY ISSUES:** Whether Respondent properly followed the requirements in the nonrenewal of Grievant's contract. Whether Grievant proved that Respondent's decision was arbitrary and capricious given Grievant's history of absenteeism.

**SUMMARY:** Grievant, a probationary employee, grieved the nonrenewal of his probationary contract. West Virginia Code § 18A-2-8a, not West Virginia Code § 18A-2-8, applies to the nonrenewal of a probationary contract at the end of the school year. Respondent properly followed the requirements of West Virginia Code § 18A-2-8a in the nonrenewal of Grievant's contract. Grievant failed to prove that Respondent's decision was arbitrary and capricious given Grievant's history of absenteeism and continued absence even after taking all days off allowed under his contract. Accordingly, the grievance is denied.

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**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Inappropriate Behavior; Fraud; Vehicle Renewal; Unprofessional Conduct; Inappropriate Comments; Improper Touching
<b><u>CASE STYLE:</u></b>	<u>Gump v. Division of Motor Vehicles</u> DOCKET NO. 2014-0032-DOT (12/11/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent demonstrated that Grievant directed an employee to fraudulently issue her a vehicle registration. Whether Respondent demonstrated that Grievant engaged in unprofessional conduct.
<b><u>SUMMARY:</u></b>	Grievant was suspended for ten days without pay for directing a subordinate to “fraudulently” issue her a vehicle registration, for directing her to print a temporary registration card, and for unprofessional behavior, specifically later pulling the same subordinate toward her and telling her, “I ought to kick you in the ass,” to which the subordinate responded in kind. Grievant then apologized for the entire misunderstanding. Respondent did not demonstrate that Grievant intended to commit fraud when she asked a subordinate to renew her vehicle registration when the personal property taxes had not been paid, or that she acted improperly in directing that a temporary registration card be issued. Grievant knew that the subordinate would check online to see whether her taxes had been paid, and she thought her husband had paid them. Respondent demonstrated that Grievant exhibited unprofessional conduct, and that she engaged in inappropriate touching of a co-worker. Grievant’s ten-day suspension without pay is reduced to a three-day suspension without pay.

<b><u>KEYWORDS:</u></b>	Gross Misconduct; Suspension; Representation; Workplace Violence; Professional Behavior; Relief
<b><u>CASE STYLE:</u></b>	<u>Borchert v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2013-1126-CONS (12/3/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent met its burden of proof and demonstrated Grievant engaged in gross misconduct.
<b><u>SUMMARY:</u></b>	Grievant was suspended for three days for slapping another employee and pushing her against the wall. Grievant alleges the incident was horseplay and that he was joking around. Record established that the physical altercation violated Respondent's prohibition against workplace violence and expectations of professional behavior by its employees. Respondent proved by a preponderance of the evidence the charges against Grievant and demonstrated that the three-day suspension was appropriate. Therefore, this grievance is denied.
<b><u>KEYWORDS:</u></b>	Gross Misconduct; Workplace Security Policy; Threatening and Assaultive Behavior; Insubordination; Ignoring a Specific Directive; Due Process; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Wickline v. Division of Fleet Management</u> DOCKET NO. 2013-2107-DOA (12/11/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent demonstrated that Grievant's behavior was insubordinate and whether Respondent established that the disciplinary action taken was for good cause, and not arbitrary and capricious.
<b><u>SUMMARY:</u></b>	Grievant protests the termination of his employment. Grievant argues the discharge was not warranted nor appropriately executed. Grievant, with the assistance of legal counsel, seeks reinstatement. Respondent established Grievant knowingly disregarded a clear directive provided to him, and further violated applicable provision(s) of Workplace Security Policy regarding Threatening and Assaultive Behavior. Grievant's actions constitute misconduct, and provided justification for termination in the circumstances of this matter.



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**KEYWORDS:**

Discrimination; Management Decision

**CASE STYLE:**

Mangus v. Human Rights Commission

DOCKET NO. 2013-1009-HRC (12/31/2013)

**PRIMARY ISSUES:**

Whether Grievant proved his claims by a preponderance of the evidence.

**SUMMARY:**

Grievant, an investigator, asserts that management treated him differently than other similarly situated employees, when it stopped allowing him to keep his case files at his desk. Grievant further asserts that he was directed to rewrite reports and complaints more often than his co-workers. Grievant also asserts that the centralized filing system his employer implemented is inefficient and causes him to waste time. Respondent denies Grievant's claims, and asserts that the decision to implement the centralized filing system was the prerogative of management and violates no rules, policy, or law. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

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**KEYWORDS:**

Reasonable Accommodations; Termination Without Good Cause; Neglect; Employee Conduct; Progressive Discipline; Abuse and Neglect; Medical Leave of Absence; Reprimand; Shift Change; Reasonable Accommodations; Notice

**CASE STYLE:**

Reed v. Department of Health and Human Resources/Jackie Withrow Hospital

DOCKET NO. 2012-1130-CONS (12/10/2013)

**PRIMARY ISSUES:**

Whether Respondent proved that Grievant violated the applicable Employee Conduct and Abuse and Neglect policies. Whether Grievant demonstrated that she was entitled to notification of a shift change by Respondent, or that the shift change was arbitrary or capricious. Whether Grievant established a claim of discrimination. Whether Grievant proved that she was entitled to additional modified duty/accommodation from the Hospital. Whether Respondent demonstrated that Grievant was not terminated.

**SUMMARY:**

Grievant asserts she was terminated from her position as a Health Service Worker at Jackie Withrow Hospital because the Hospital and the Office of Human Resources Management at DHHR provided her with contradictory information concerning whether she had been terminated. Respondent responds that Grievant misunderstood its communications and the Hospital did not terminate Grievant. The evidence demonstrated that Grievant believed, for a limited period of time of approximately three weeks, that she had been terminated, based upon the contradictory information she received. However, Respondent demonstrated Grievant was not terminated and that Grievant was unequivocally informed of this fact by the Hospital on July 30, 2013.

Grievant further asserts that she was issued a written reprimand without good cause following an incident in which she restrained a combative/agitated resident. The Hospital demonstrated that Grievant violated various provisions of DHHR Policy Memorandum 2108 - "Employee Conduct" and Abuse and Neglect policies because she physically restrained a resident and witnessed other staff members doing the same, but did not report the actions of the other staff. Issuing a written reprimand was disciplinary action consistent with Respondent's progressive discipline policy.

Grievant also asserts that she was entitled to notice from the Hospital when Hospital administration changed her shift after she returned from leave. Grievant failed to prove any obligation on the part of the Hospital to provide advance notice to its employees of shift/schedule changes or that her assigned shift change was arbitrary or capricious. Additionally, Grievant was given accommodations/less than full duty work by the Hospital for 120 days after a work-related injury, based on her medical/physical restrictions, and asserts that she is entitled to

accommodation beyond those 120 days. Respondent responds that it properly applied West Virginia Division Of Personnel Administrative Rule 143 C.S.R. 1 § 14.4(h) in accommodating Grievant upon her return to work after her medical leave of absence. Grievant was given approximately four months of accommodations by the Hospital. Grievant did not establish that she was entitled to additional modified duty/accommodations by the Hospital.

Grievant further asserts that she was discriminated against because the Hospital allowed another Health Service Worker to have six months of modified duty and Grievant only had four months. Grievant did not prove discrimination under W. Va. Code § 29-6A-2-2(d) because she failed to demonstrate that the other Health Service Worker was "similarly situated" to her, with respect to physical limitations.

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**KEYWORDS:**

Misconduct; Harassment; Hostile Work Environment; Racial Discrimination; Racially Offensive Language; Physical and Violent Assaulted; Arbitrary And Capricious

**CASE STYLE:**

Heath v. Division of Highways

DOCKET NO. 2013-1661-DOT (12/5/2013)

**PRIMARY ISSUES:**

Whether Respondent's choice of termination as a penalty in the circumstances presented was an abuse of discretion.

**SUMMARY:**

Grievant was dismissed from employment for physically and violently assaulting the same co-worker in May and August of 2011, and using racially offensive language toward this African-American co-worker in the course of these assaults. DOH also alleged that Grievant's behavior represented a pattern of threatening and racially offensive behavior which also occurred while Grievant was employed with the Greenbrier County Maintenance Organization. DOH presented no evidence to support this latter claim. Based upon credibility determinations where several controlling facts were in dispute, the employer proved the assault and racially offensive language charges in 2011 by a preponderance of the evidence. Nonetheless, the employer's choice of termination as a penalty in the circumstances presented was determined to be an abuse of discretion, and a lesser penalty of a 30-day suspension and demotion to a non-supervisory position was substituted as the most appropriate sustainable penalty for the charges proven.

<b><u>KEYWORDS:</u></b>	Selection; Education; Experience; Policy Violation; Most Qualified Applicant; Selection Process; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Underwood v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2012-0237-DHHR (12/6/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved that Respondent's selection decision was arbitrary and capricious and whether Grievant proved she was the most qualified candidate overall.
<b><u>SUMMARY:</u></b>	Grievant was not selected for a Community Services Manager position, despite being more qualified by all objective criteria in every way than the successful candidate. There were multiple errors in the selection process and Respondent could not explain how the successful candidate was the best fit for the job. The selection decision was arbitrary and capricious. Grievant was also able to prove by a preponderance of the evidence that she was the most qualified applicant overall. Accordingly, the grievance is granted.
<b><u>KEYWORDS:</u></b>	Job Duties; Return to Work; Light Duty; Restrictions; Discrimination; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>Jividen v. Division of Highways</u> DOCKET NO. 2012-0921-DOT (12/5/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent's decision to deny Grievant a light duty assignment was arbitrary and capricious or discriminatory.
<b><u>SUMMARY:</u></b>	Grievant alleges that Respondent should have granted his request for light duty work after receiving a letter from his health care professional stating that Grievant could return to work under certain restriction. Grievant also asserts that Respondent discriminated against him by allowing a worker with, what he believed to be, similar restrictions to work. Grievant failed to prove that Respondent's decision to deny his request for light duty was arbitrary and capricious. Grievant also failed to prove that he was similarly situated to the worker he cited as receiving light duty. In fact, that worker was on full duty with no restrictions. The grievance is DENIED.

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**KEYWORDS:** Sexual Harassment; Consensual; Termination; Subordinate; Hearsay

**CASE STYLE:** Mullins v. Regional Jail and Correctional Facility  
Authority/Southwestern Regional Jail  
DOCKET NO. 2013-1660-MAPS (12/20/2013)

**PRIMARY ISSUES:** Whether Respondent proved Grievant violated RJA policies regarding sexual harassment.

**SUMMARY:** Grievant was accused of sexually harassing a subordinate employee. After an investigation, Grievant was terminated from his position at the regional jail for sexually harassing a subordinate employee. Grievant denied that he sexually harassed the subordinate employee, and asserted that he and the subordinate were instead involved in a consensual romantic relationship. Respondent failed to meet its burden of proving the charges alleged against Grievant. Accordingly, this grievance is GRANTED.

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**KEYWORDS:** Leave Time; Discrimination; Relief; Remedy; Moot

**CASE STYLE:** Halstead v. Division of Motor Vehicles  
DOCKET NO. 2013-0865-CONS (12/17/2013)

**PRIMARY ISSUES:** Whether there is remedy available to Grievant related to the consolidated grievance.

**SUMMARY:** The two grievances center on events which occurred on or before December 4 and 6, 2012. Grievant claims that sick and annual leave were not being fairly assessed by her supervisors and that her supervisors were singling her out for abuse, at least in part, as a result of these grievances. Respondent conducted an audit of the sick and annual leave for all employees in the IRP unit and restored any leave which had been improperly taken from them, including Grievant. Additionally, Grievant and the upper management of DMV agreed to move Grievant out of the IRP unit during the pendency of these grievance proceedings and any investigations so she would not be under the supervision of Mr. Armstrong and Mr. Kingery. There was no other relief available to Grievant pursuant to these grievances. Accordingly, the consolidated grievances are DISMISSED.

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**KEYWORDS:** Policy Directive; Resignation; Remedy; Relief; Moot

**CASE STYLE:** Bonnett, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2013-0184-CONS (12/20/2013)

**PRIMARY ISSUES:** Whether Grievants would gain any remedy from a ruling on the issues set out in their consolidated grievance since Grievants' resignation from employment with Respondent.

**SUMMARY:** Both Grievants retired before this matter was heard at level three. The remedy requested by both Grievants is not available to them after their retirement. Accordingly, this matter is dismissed as moot.

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**KEYWORDS:** Transfer; Resignation; Rescind Resignation; Working Conditions; Constructive Discharge

**CASE STYLE:** Everly-Strawn v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital  
DOCKET NO. 2012-1163-DHHR (12/24/2013)

**PRIMARY ISSUES:** Whether Respondent constructively discharged Grievant by refusing to allow her to rescind her resignation.

**SUMMARY:** Grievant argues that she was constructively discharged by Respondent when its agents refused to allow her to rescind her resignation. Respondent's agents took sufficient good faith steps in reliance upon Grievant's resignation, prior to her attempt to rescind it, to render the resignation final. Respondent was under no obligation to allow Grievant to rescind her resignation, therefore the grievance is DENIED.

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<b><u>KEYWORDS:</u></b>	Position Description Form; Classification; Job Duties; Pay Plan Implementation Policy; Reallocation; Arbitrary or Capricious
<b><u>CASE STYLE:</u></b>	<u>Cassis v. Department of Health and Human Resources/Deputy Secretary for Administration and Division of Personnel</u> DOCKET NO. 2013-0020-DHHR (12/31/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved by a preponderance of the evidence that the ASM 4 classification is a better fit for the position he occupies than the ASM 3 classification.
<b><u>SUMMARY:</u></b>	Grievant is employed by DHHR as an Administrative Services Manager 3 as the Director of an administrative support office of nine employees. Grievant grieved the DOP's determination that the position should remain classified as an Administrative Services Manager 3, and not as an Administrative Services Manager 4. DOP's interpretation of the critical distinction between the two class specifications is not clearly wrong as it is supported by substantial evidence. While some of Grievant's duties may fit specific statements within the sought class specification, the class specifications must be read as a whole, and Grievant's duties do not fit that class specification as a whole. Grievant failed to prove by a preponderance of the evidence that the sought classification is the best fit for the position he occupies. Accordingly, the grievance is denied.

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<b><u>KEYWORDS:</u></b>	Right to Representation; Disciplinary Action; Policies
<b><u>CASE STYLE:</u></b>	<u>Beaton, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2013-0496-CONS (12/20/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent's Guidelines instructing staff that an employee does not have the right to have a representative present at investigatory meetings conducted by a facility staff that does not have authority to impose or recommend discipline is contrary to applicable law.
<b><u>SUMMARY:</u></b>	Grievants work in various classifications at Sharpe Hospital. The central issue in this case is the employee's right to representation during any meeting that is held with the employee for the purpose of discussing or considering disciplinary action. In the instant case, when there are allegations against an employee at the hospital of patient abuse or neglect, an investigation is conducted by the Respondent. If the investigatory interview is conducted by a facility staff who does not have the authority to impose or recommend discipline, Respondent's Guidelines instruct staff that the employee does not have the right to have a representative present at the meeting. This guideline is contrary to the clear applicable statutory language and recent decisions of the Grievance Board. A representative is permitted at any time a meeting could lead to disciplinary action, regardless of whether the person in the meeting has the authority to issue the discipline. Accordingly, employees have a right to representation during investigatory meetings that are not per se discipline, but where discipline could result.